
The Polish “muzzle” law, violation of EU primacy, independence, impartiality and private life of judges

Ernest Phillips

DOI: [10.5281/zenodo.8269017](https://doi.org/10.5281/zenodo.8269017)

Follow this and additional works at:

<https://inteulm.free.nf/index.php/inteulm/issue/view/2>

Recommended Citation

Phillips, E. (2023). The Polish “muzzle” law, violation of EU primacy, independence, impartiality and private life of judges. *International and European Union Legal Matters (INTEULM)*, vol. 1, n. 1, 153-202, Article 4

Available at:

<https://inteulm.free.nf/index.php/inteulm/issue/view/2>

This article is brought to you for free and open access by CEIJ. It has been accepted for inclusion in International and European Union Legal Matters (INTEULM). For more information, please contact: inteulm@gmail.com

The Polish “muzzle” law, violation of EU primacy, independence, impartiality and private life of judges

Ernest Phillips, Ph.D in European Comparative Politics, US

Abstract: The present paper is based on the Polish muzzle law which once again paved the way for a new new infringement procedure against Poland. It is once again a sentence which shows the struggle of the European Commission against Poland. This sentence is also based on the latest judgments of the past, as well as enhances the role of the CJEU as a protagonist that protects the rights deriving from the EU law.

Keywords: Polish muzzle law; violation of the primacy of the EU; independence; impartiality; private life of Polish judges; EU Law; European Commission; CJEU; European Parliament; rule of law; Article 2 TEU; Polish judiciary.

Preliminary remarks

The judgment of the Court of Justice of the European Union of 5 June 2023¹ was the result of the “muzzle law” which promulgated by the Polish Republic on 20 December 2019 concerning the independence and impartiality of the private life of judges. However, it is not the first ruling that deals with the “life” of Polish judges.

The ruling was promoted by the European Commission and is based on Article 258 TFEU. It contains about 389 paragraphs (Kierst, 2023, Pech, 2023). We are talking about an infringement procedure initiated by the European Commission against Poland which was adopted after amendment on 20 December 2019 and entered into force on 14 February 2020 on the occasion of the organization of ordinary, administrative and common law jurisdictions according to the law of the Supreme Court and of other related laws (Liakopoulos, 2022)². The “story” began after

1CJEU, C-204/21, European Commission v. Republic of Poland of 21 April 2023, ECLI:EU:C:2023:334.

2Was nominated as muzzle-law from the president of the Supreme court of Poland: Małgorzata Gersdorf.

the innovations promoted by the Supreme Court in 2017 on the powers of an administrative nature that are given to Polish judges as well as the related criminal proceedings against them up to pre-trial detention. The same law prevented the Supreme Court from discussing the legitimacy of the jurisdictional bodies, also on the constitutional bodies of the State, and on other bodies to which the relative control of protection of their rights is attributed. The law imposed certain obligations on Polish judges regarding membership of associations such as non-profit foundations and political parties as well as the related online ban of information from collections of publications of their work (Gersdorf, Pilich, 2020; Duncan, Macys, 2020).

This type of modification has resulted in reactions from the part of the EU based on violations of the primary and secondary law of the Union especially of Article 19, par. 1, lit. b) TEU which provided for the obligation to establish judicial remedies necessary for the effective judicial protection on the sectors that are pre-established and organized by Union law as also of Article

47 CFREU (Blanke, Mangiamelli, 2021) regarding the effective remedy and the right of access to an independent, impartial and pre-established judge by law. The violation of the primacy of the law of the EU, as well as the reference for a preliminary ruling, Article 7, 8, paragraph 1 CFREU, Article 6, par. 1, first paragraph, lett. c), e) and par. 3 of Article 9 of the Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016³, are topics of continuous discussion by the scientific community, politics, and scholars of the EU law.

The history of the rule of law began about five years ago and the jurisprudence of the CJEU continues to shed light and tries to stop and protect the principles of democracy and above all the principles of the EU law (Pech, 2023b; Kochenov, 2023; Torrecillas Martinez, 2023).

³Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1-88.

Infringement procedure against Poland

In order to react against Poland, the European Commission spent a lot of time from the pre-litigation phase to the litigation one despite the fact that Article 258 TFEU allows the European Commission broad discretion to open the infringement procedure (Prete, 2017; Ibàñez Garcia, 2020; Várnay, 2020; Pohjankoski, 2021; Richard, 2021).

About four months have passed since the European Commission chose to open the infringement procedure and one year after the entry into force of the related law which was adopted by Poland (Pech, Wachowiec, 2021). The Covid pandemic, plus the summer period (Priest, 2020) were some of the justifications for this delay arriving on 1st November 2020 to send Poland a letter putting it in formal notice after a complementary reasoned opinion from 27 January 2021 and the related appeal to the CJEU which was filed on 1st April 2021 (Sadurski, 2023; Vissers, 2023)⁴. The

⁴The “lex Tusk” law as it has been called was to prevent Donald Tusk, former Polish premier from 2007 to 2014 and former president of the European Council from 2014 to 2019 and leader of the largest opposition party, from participating in the general elections which are scheduled for

conclusions of the Advocate General after the approximately six months for the sentence to be pronounced, it was a normal time for the conclusion of the relative sentence.

Some provisional measures of the CJEU and notice of default of the judgment in question

From 1st April 2021 the European Commission with a separate act requested provisional measures based on Article 279 TFEU to request the suspension of laws that were against the primary law of the EU (Blanke, Mangiamelli, 2021).

With the P 7/20 case after the judgment of the Tybunal Konstytucyny with an ultra vires ruling and basing itself on the Polish constitution, it declared the ordinance of the EU of 14 July 2021 incompatible according to its own constitution. Poland on 16 August 2021 asked the CJEU to revoke the ordinance given that it had to be supervised by the Grand Section of the CJEU.

next autumn. The law provided for 10 years to be banned from holding public office and those convicted of having relations with the Kremlin and the oligarchy.

By order of 6 October 2021⁵, the Vice-President of the Court rejected the Polish request based on Article 161, par. 1 of the regulation of procedure and on Article 1 of the Decision 2012/671/EU of the CJEU of 23 October 2012 concerning the judicial functions of the Vice-President of the CJEU⁶.

According to the vice president, the provisional measures adopted against Poland, according to Article 163 of the regulation of the procedure, are not in contrast but a change of circumstances with the relative and total content of the ordinance of 14 July 2021. According to the primacy of the EU law, a Member State cannot invoke provisions that derive from national law even if they are of constitutional rank to undermine the effectiveness of the law of the Union (Moraru, Bercea, 2022)⁷.

⁵CJEU, C-204/21 R, Commission v. Poland of 6 October 2021, ECLI:EU:C:2021:834, not yet published.

⁶2012/671/EU: Decision of the Court of Justice of 23 October 2012 concerning the judicial functions of the Vice-President of the Court, OJ L 300, 30.10.2012, p. 47-47.

⁷CJEU, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația “Forumul judecătorilor din România” and others of 18 May 2021, ECLI:EU:C:2021:393, not yet published, par. 245.

Given that the change of letters had no results, on 7 September 2021, the European Commission was prompted to condemn Poland and to pay a penalty to the EU budget to implement the incumbent obligations. Poland asked for the matter to be discussed and the Grand Chamber decided that the European Commission's request would be rejected. Poland argued between other things that a formal notice was not based solely on the decision of a judge who issued the precautionary order. Poland did not recognize the order of 20 September 2021 relating to C-121/21 R between the European Commission and Poland case given that the criteria for calculating the amount of the penalty payment are not justified.

Indeed, with the ordinance of 27 October 2021, the Danish vice president of the CJEU Lars Bay Larsen⁸ stated that:

“(...) it is up to the decision, on a case-by-case basis, on applications for suspension of execution or on applications for interim measures, evaluating whether to withhold knowledge of it or to refer the matter to the Court in view of the attribution to

⁸CJEU, order of Vice President: C-203/21 R, Commission v. Poland of 27 October 2021, ECLI:EU:C:2021:878, not yet published.

a panel of judges (...)”.

He considered the arguments put forward by Poland irrelevant arguing that it was sufficient to recall the jurisprudence of the Court⁹ as well as the order of the Vice-President of the Court. He had already explicitly rejected the argument that a penalty could not be imposed by the judge of the interim procedure without referring the case to a panel of judges (Elingsen, 2021).

Poland also requested the inadmissibility of the request of the European Commission to obtain the imposition of a penalty without specifying the amount of the penalty and the related rights of defense of Poland, thus submitting its observations on the related amount. In reality, both Article 279 TFEU and Article 160 of the regulation of procedure may require the European Commission to propose to the CJEU a concrete amount as a penalty under interim measures. The proposals of the European Commission are also not binding on the discretion of the judge who is free respecting the circumstances and the proportion

⁹CJEU, C-441/17, Commission v. Poland of 20 November 2017, ECLI:EU:C:2017:877, published in the electronic Reports of the cases.

according to the financial capacity of the State concerned¹⁰. The CJEU had already decided on the amount of a penalty and the European Commission's application did not contain any indications in this regard¹¹.

The vice-president of the CJEU has taken a position for the validity of the direct request of the European Commission obtaining the relative penalty despite the fact that Poland has not complied with the relative ordinance of 14 July 2021, by continuing to apply national law rules and by ordering the suspension of the measures adopted. The European Commission has ensured the full effectiveness of the order of 14 July 2021 and the effective application of the law of the Union, as well as has shown respect for the principles of the rule of law and of the provisional measures that decided. Poland rejected the related arguments by adopting measures based on its own law stating that the Polish judges respect the order of 14 July 2021 and

10CJEU, Order of the Vice president of the Court in case: C-121/21 R, Czech Republic v Poland (Mine de Turów) of 20 September 2021, ECLI:EU:C:2021:752, not yet published, par. 50.

11CJEU, C-441/17, Commission v. Poland of 20 November 2017, op. cit.

arguing that the determination of the necessary measures were in accordance with the precedent set by the order of 8 April 2020, *Commission v Poland*, case C-791/19 R¹².

The Vice-President of the CJEU did not accept the related arguments from the Poland showing that the mitigating circumstances were based on the amount of the related fine. Therefore, it is established to require Poland to pay the European Commission a fine of one million euros per day after the date of notification to Poland of the relevant order and until the day in which the Member State confirmed the obligations deriving from the order of 14 July 2021, and the related sentence was issued affirming that the case on the matter was closed.

After the Polish request of 10 March 2023 the ordinance was revoked and amended by reducing the amount of the default. Precisely, the vice president of the CJEU with the relative ordinance of 21 April 2023 changed the amount to 500,000 euros per day after the ordinance was signed. This is a guarantee of a

¹²CJEU, C-204/21 R, *Commission v. Poland* of 14 July 2021, ECLI:EU:C:2020:593, not yet published with 113 paragraphs.

remarkable measure as it was characterized by the Vice President of the CJEU and the interim measures that were decided by the order of 14 July 2021. The Vice President also had to check the changes in the Polish internal order that emerge elements that demonstrate the change in circumstances based on the penalty that was not wholly or partly justified. The ordinance was based on Article 1 of the law of 9 July 2022 which repealed the rule which attributed the competence to rule in first and second instance on the related applications for authorization by initiating criminal proceedings to the titular and auxiliary judges against the same regulated section which was abolished (Liakopoulos, 2022).

Poland has instituted legal remedies, i.e. it has applied for a review of the relevant disciplinary procedure for the suspension of effects. Once the request for re-examination has been submitted, the effects of the decision proposed by the relative disciplinary section will not be suspended pending the examination of the latter. The vice-president said that Poland had

only partially considered the interim measures.

What interested Brussels the most was the suspension of the provisions which prohibited national judges from verifying compliance with the requirements of the EU law based on the independence and impartiality of the judge. According to the vice president Poland did not repeal its application which was not suspended and the appeal which was provided for by the law of 9 June 2022 was partly exhausted by the application and as a consequence Poland had complied with the interim measures.

The vice president argued that:

“(...) the Polish provisions covered by the ordinance of 14 July 2021 have not been repealed nor their application suspended, with the consequence that, in principle, it would have been very possible, on the basis of these provisions, the prospect of a disciplinary offense (...)”.

In this respect, Poland had only partially complied with the interim measures regarding the obligation to suspend the application of the Polish provisions establishing the exclusive competence of the Extraordinary Control and Public Affairs Section to examine complaints concerning the lack of

independence of a judge or court. The examination of the ordinance adopted on 29 July 2021 by the President of the Supreme Court, who also presides over the Extraordinary Control and Public Affairs Section, did not make possible to demonstrate that the said Section could no longer examine the pending cases of which it had been invested nor that the cases falling within the competence of this Section should no longer be referred to it by the ordinary courts. Furthermore, the order just referred to did not even provide for cases not covered by the new remedy established by the law of 9 June 2021 to be referred to the ordinary courts¹³.

The ordinance of 21 April 2023 also took into consideration the obligation for Poland not to send the cases that are attributed to the competence of the Disciplinary Section of the Supreme Court. Already from 9 June 2022 it has attributed to two distinct sections of the Supreme Court. The section relating to professional liability and this to the extraordinary control of

¹³CJEU, C-204/21 R, Commission v. Poland of 14 July 2021, ECLI:EU:C:2020:593, published in the electronic Reports of the cases.

public issues according to the European Commission are repeated and are not satisfied as already recalled with the sentence of the 19 November 2019, A.K. and others, regarding the independence of the Section that governed the Supreme Court (Birkinshaw, 2020; Krajewski, Ziòłkowski, 2020; Gajda-Roszczyńska, Markiewicz, 2020; Elòseguí, Miron, Motoc, 2021)¹⁴.

In any case, according to the vice president: “(...) the Commission's assertion is not based “directly” either on a non-compliance judgment or on a preliminary ruling (...)”. The judge

14CJEU, C-585/18, A.K (Indépendance de la chambre disciplinaire de la Cour suprême) of 19 November 2019, ECLI:EU:C:2019:982, published in the electronic Reports of the cases. The CJEU states that: “(...) the guarantees of independence with respect to legislative and executive powers, and impartiality presuppose the existence of rules, relating in particular to the composition of the body, the appointment, the duration of the functions as well as the causes for abstention, of recusal and revocation of its members, which make it possible to dispel any legitimate doubt that individuals may have regarding the impermeability of said body with respect to external elements and its neutrality with respect to opposing interests (...)”, (CJEU, C-585/18, A.K (Indépendance de la chambre disciplinaire de la Cour suprême) of 19 November 2019, op. cit., parr. 123-124).

of the summary procedure should therefore have previously assessed the *fumus boni iuris* of the compatibility with Article 19, par. 1 TEU of the procedure for the appointment of judges of the two new chambers of the Supreme Court, subject to the final assessment of these complaints by the Court. Assessment which according to the jurisprudence of the CJEU¹⁵ could not be concluded without violating the procedural rights of the State concerned and the related complaint supporting an infringement action which was examined by the CJEU. The Vice-President of the CJEU did not accept the related argument of the European Commission but only considered the power/duty and if it was appropriate to propose a new infringement appeal thus completing the pre-litigation phase according to Article 258 TFEU (Blanke, Mangiamelli, 2021).

¹⁵CJEU, C-292/11 P, Commission v. Portugal of 15 January 2014, ECLI:EU:C:2014:3, parr. 51, 55 and 56.

CJEU competences, rule of law, independence of justice and primacy of law

The CJEU is not the first time it has taken a stand regarding the situation in Poland. With regard to this specific case, the sentence was based on that of the Trybunał Konstytucyjny of 14 July 2021 (Zoll, Południak-Gierz, Bańczyk, 2022). This is a ruling based on Article 4, par. 3 TEU where the Member States have adopted measures of a general nature to ensure the execution of the obligations of the treaties or consequential for the acts of the institutions of the Union according to Article 279 TFEU (Blanke, Mangiamelli, 2021) which is dedicated to the precautionary procedure as interpreted by the ordinance of 8 April 2020 in Commission v. Poland case which was incompatible with the provisions of the Polish constitution. The CJEU has decided ultra vires that the precautionary measures which are taken against Poland are not based on the principles of the prevalence of the law of the Union and the direct effect of this type of law. In the same sentence:

“(...) the judges of Warsaw ruled that in case of conflict between their own decisions and those of the CJEU, “the last word” in cases of principle relating to the Polish constitutional order lies within the constitutional judge. This would be supported by both the principle of the powers conferred by the Union and the principle of respect for the national identity of the Member States as resulting from the political and constitutional structures of the Member State (...)”¹⁶.

Within this context, the CJEU decided through paragraphs 60 and 80 of the same sentence some elements that have to do with the control of the respect of the rule of law by the Member States¹⁷. CJEU on par. 73 states that the judicial organization falls within

16CJEU, C-292/11 P, *Commission v. Portugal* of 15 January 2014, op. cit., par. 57.

17CJEU, C-156/21, ECLI:EU:C:2021:974 and C/157/21, ECLI:EU:C:2021:978 of 2 December 2021. The Advocate General Manuel Campos Sanchez rejects the *lex specialis* argument that: “(...) Article 7 TEU would be bypassed by the new conditionality mechanism, maintaining that the conditionality mechanism is substantially distinct both in its purpose, as well as in its implementation. Reiterating his analysis concerning the first plea of the applicants, the AG lays out that the new Regulation has the aim of protecting the Union’s budget from the consequences of rule of law breaches in the Member States. Article 7 TEU however, offers a political procedure, which is subject to different conditions and provides for more far-reaching consequences, including the suspension of certain membership rights (...) parr. 227-229). The Opinions open the door to an even broader protection of the rule of law through the various legal channels offered by the Treaties.

the competence of the Member States and respects the obligations deriving from Union law, Article 2 and 19 TEU¹⁸.

Therefore the CJEU stated that:

“(...) Article 2 TEU, is based on values which are common to Member States, confirming that this provision does not constitute a mere statement of political orientations or intentions, but contains values which (...) are part of the very identity of the Union as the common legal order, values which are embodied in principles which entail legally binding obligations for the Member States (...)”¹⁹

and that respect for these values is therefore a condition for the enjoyment of all the rights deriving from the application of the treaties.

Respect for the rule of law is closely related to the so-called “political” criteria, such as the presence of stable institutions which guarantee democracy, the primacy of law, human rights,

18CJEU, C-791/19, *Commission v. Poland* of 8 April 2020, ECLI:EU:C:2020:277, not yet published, par. 50, 60, 62. C-430/21, RS (*Effet des arrêts d’une cour constitutionnelle*) of 22 February 2022, ECLI:EU:C:2022:99, not yet published.

19C-430/21, RS (*Effet des arrêts d’une cour constitutionnelle*) of 22 February 2022, op. cit., par. 232. C-156/21, *Hungary v. Parliament and Council* of 16 February 2022, ECLI:EU:C:2021:974, not yet published. C/157/21, *Poland v. Parliament and Council* of 16 February 2022, ECLI:EU:C:2021:978, not yet published, par. 67.

respect for minorities and their protection, criteria which must be respected by candidate states in order to be able to join the European Union, as established by the Copenhagen European Council of 21-22 June 1993, precisely with a view to the already then proposed enlargement of the European Union to the countries of Eastern Europe.

The Treaty of Amsterdam of 1997 included in Article 49 TEU, which governs the requirements for joining the Union, respect the values referred to in Article 2 TEU and has committed the states that join the Union to promote these values. The expected promotion implies that the Member States cannot modify their legislation in such a way as to lead to a reduction in the protection of the value of the rule of law, a value which is embodied, in particular, in Article 19 TEU. The Member States are therefore required to ensure that any regression, with regard to this value, of their legislation on the organization of justice is avoided, by refraining from adopting any measure which could affect the independence of judges.

The principle of non-regression in the protection of the rule of law has by now become, mainly thanks to the Court of Justice, an essential condition and an insurmountable limit of contemporary constitutionalism (Leloup, Kochenov, Dimitrovs, 2021; Dice, 2023; Scholtes, 2023)²⁰.

The primacy of the law of the Union was affirmed in the Costa judgment 6/64 of 15 July 1964²¹, which:

“(...) prohibits the Member States from opposing it to further unilateral measures, which would call into question the legal basis of the Community itself and the implementation of the purposes of the EEC Treaty (...)”.

With the adoption of the TFEU and the declaration n. 17 relating to primacy which was annexed to the final act of the intergovernmental conference which adopted this treaty it was stated that:

“(...) the settled case-law of the Court of Justice of the European Union, the treaties and the law adopted by the Union on the basis of the Treaties they prevail over the law of the Member

20CJEU, C-896/19, *Republika v. II-Prim Ministru* of 20 April 2021, ECLI:EU:C:2021:311, not yet published, parr. 63, 64, 74. Joined cases: C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion* of 21 December 2021, ECLI:EU:C:2021:1034, not yet published, par. 162.
21CJEU, *Costa* 6/64 of 15 July 1964, ECLI:EU:C:1964:66, I-00585.

States (...)”.

It is imposed on all the organs of the Member States and could not be hindered by further national provisions, even if of constitutional rank, as this would alter respect for the principle of equality between the Member States before the treaties, which is also an expression of the principle of loyal cooperation set out in Article 4, par. 3 TEU²².

Article 19, par. 1, lit. b) TEU is based on Article 47 CFREU according to the CJEU which states that the provision has direct effect as it imposes on the Member States a clear, precise and unconditional result obligation, above all having regard to the independence, impartiality and pre-establishment by law of the jurisdictions called to interpret and apply EU law (Miasik, Szwarc, 2021)²³. The obligation to disapply any national rule,

22CJEU, C-430/21, RS (Effet des arrêts d’une cour constitutionnelle) of 22 February 2022, op. cit., par. 55.

23CJEU, C-573/17, Popławski of 24 June 2019, ECLI:EU:C:2019:530, par. 61. C-430/21, RS (Effet des arrêts d’une cour constitutionnelle) of 22 February 2022, op. cit., C-585/18, A.K (Indépendance de la chambre disciplinaire de la Cour suprême) of 19 November 2019, op. cit., par. 161. joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația “Forumul judecătorilor din România” and others of 18 May 2021, ECLI:EU:C:2021:393, op. cit., par. 248.

jurisprudence or practice which is contrary to provisions of Union law, contrary to the principle of primacy, falls to the national courts to modify their jurisprudence in order to make it compatible with the law of the Union. Neither the principle according to which any competence not attributed to the Union belongs to the Member States (Article 4, paragraph 1, TEU), nor that which protects the national identity of the Member States (Article 4, paragraph 2, first sentence) neither the principle of attribution of the Union, as the key to the delimitation of the competences of the Union (Article 5, paragraph 1, TEU) nor, even less, the jurisprudence of a national constitutional court prevent the Polish provisions which the European Commission has asked the Court to declare incompatible with Union law can be removed from review by the Court of Justice having regard, in particular, to the combined provisions of Articles 19 TEU and 47 CFREU and the principle of the primacy of Union law (Di Federico, 2019; Spieker, 2019; Liakopoulos, 2019a).

Introductory appeal of the European Commission and impact of the Polish law of 9 June 2022

According to the Poland during the hearing of 28 June 2022 it was stated that the judicial organization has been considered unjustified to continue a judgment which is related to the complaints proposed by the European Commission itself and where the CJEU has declared not to follow. The CJEU rejected this position based on past jurisprudence²⁴ in relation to non-compliance²⁵ and to the situation of the Member State that submitted the related reasoned opinion on 30 October 2020 and the complementary reasoned opinion of 27 January 2021.

The CJEU censured the independence and impartiality of the judgments in the disciplined section of the supreme court and the authorization of criminal proceedings against the judgments, detention and reduction of remuneration to have knowledge in

24CJEU, C-34/72, Commission v. Italy of 7 February 1973, 34/72, ECLI:EU:C:1973:13, I-00981, par. 9.

25CJEU, C-619/18 Commission v. Poland of 15 November 2018, ECLI:EU:C:2018:910, published in the electronic Reports of the cases, par. 30.

labor and social security matters and of retirement of supreme court judges²⁶. Thus Poland fails to fulfill the obligations set forth in Article 19, par. 1, second paragraph TEU given that the Polish legal system does not provide suitable guarantees to avoid the risk of political control of judicial decisions and intimidation of judges, thus losing trust in the Polish judiciary.

The CJEU according to par. 97 of the sentence adopted the conclusions of the Advocate General A.M. Collins noting the application of rules affecting the career development of judges, and above all the conditions of life, independence, impartiality, etc. Rules, (actually provisions) which are already announced in Articles 89, 110 and 112 in the judgment of 14 July 2021 which concerned *European Commission v. Poland*. These rules affirming that:

“(...) the characteristics of the Disciplinary Section and the methods of appointing judges are such as to arouse legitimate doubts in the litigants as to the possibility of direct or indirect interference by the executive and legislative powers, interference incompatible with the principles of the rule of law

²⁶CJEU, C-791/19, *Commission v. Poland* of 8 April 2020, op. cit., parr. 59-60.

(...)”²⁷.

(Follows): Disciplinary offenses and Polish judges

The third point of the infringement procedure was based on the disciplinary offenses relating to the Polish judges, where the CJEU took into consideration the relevant jurisprudence²⁸ and adopted a discipline which qualified as a disciplinary offense the compliance with the requirements of the EU law which have to do with the principles of the independent, impartial and pre-established judge by law, where Poland has been noted that does not respect Articles 19, par. 1, second paragraph TEU and 47 CFREU, and 267 TFEU (Blanke, Mangiamelli, 2021).

Thus the CJEU stated that:

“(...) in the Polish discipline the definitions of disciplinary offenses are very broad and not at all precise, given that they cover situations in which the judges must decide whether they themselves, the body in which they sit, other judges and other jurisdictions meet the requirements established by the provisions of European Union law (...)”.

²⁷CJEU, C-791/19, Commission v. Poland of 8 April 2020, op. cit., par. 102.
²⁸CJEU, C-791/19, Commission v. Poland of 8 April 2020, op. cit., parr. 136-140.

The Polish legislation, among other things, does not guarantee, on the one hand, that the liability of the judges concerned is limited to wholly exceptional cases and, on the other hand, that the disciplinary regime cannot be used for the purposes of political control of the judicial decisions. The drafting of these provisions, in the light, in particular, of the terminology used by the Warsaw legislator, manifestly echoes a series of questions posed by the Polish jurisdictions to Luxembourg regarding the scope of Article 19, par. 1, second paragraph of the TEU and to which the Court promptly replied with preliminary rulings²⁹ ascertaining the risk that the Polish provisions on the disciplinary regime of judges are interpreted in such a way as to prevent the courts from proceeding with the investigations imposed by EU law on the matter of independence and impartiality of the judges,

²⁹CJEU, C-487/19, W.Ż. () e des affaires publiques de la Cour suprême-nomination of 6 October 2021, ECLI:EU:C:2021:798, not yet published, par. 138. C-508/19, Prokurator Generalny (Chambre disciplinaire de la Cour suprême-Nomination of 22 March 2019, ECLI:EU:C:2022:201, not yet published. Joined cases: C-748/19 to C-754/19, Prokuratura Rejonowa w Mińsku Mazowieckim and others of 16 November 2021, ECLI:EU:C:2021:931, not yet published.

with the result that the norms of the law of the Union are thereby infringed. It has also stated that the same national provisions also violate Article 267 TFEU, as they involve the risk that national judges will be sanctioned in a disciplinary way for having made preliminary references to the Court (Rosas, Raitio, Pohjankoski, 2023).

However, as regards the related “manifest and flagrant violation of the provisions of the law” by the judges of the Supreme Court, the CJEU relying on its own jurisprudence³⁰ and the national provision which provides for it undermines the independence of these judges, since it does not make it possible to avoid that the disciplinary regime applicable to the said judges is used, on the one hand, for the purpose of generating pressure on them and, on the other hand, to be able to influence the content of their decisions³¹.

30CJEU, C-204/21 R, Commission v. Poland of 14 July 2021, op. cit., 134, 156, 157, from 222 to 233, 234.

31CJEU, C-204/21 R, Commission v. Poland of 14 July 2021, op. cit., parr. 164-169.

(Follows): Prohibition for judicial bodies to verify compliance with the requirements deriving from the law of the Union

The first complaint of the European Commission and the Polish provisions prohibit national bodies from verifying compliance with the requirements deriving from the law of the Union which guarantees independence, impartiality, pre-establishment by law according to Article 19, par. 1, second paragraph TFEU, and 47 CFREU and 267 TFEU (Blanke, Mangiamelli, 2021) and, primacy of the law of the Union. Thus, the judicial bodies are prevented from disapplying the relative provisions which recall the law of the Union also following the conclusions of the Advocate General A.M. Collins stating that:

“(...) the appeal did not satisfy the provisions of art. 120, letter c) of the procedural regulation and, therefore, decided to declare the complaint inadmissible (paragraphs 190 and 197)”.

The formulation of the Warsaw legislation, preventing the legitimacy of the appointment and the power to administer justice by the judicial bodies, including the constitutional ones, from being called into question, may lead to a wide range of acts,

necessary to comply with the aforementioned norms of the Union, may fall within the scope of these prohibitions. The Polish provisions in question are likely to prevent a higher-level court, entrusted with the examination of a decision of a lower judge, from being able to evaluate the legitimacy of the appointment of a judge or, even, his power to exercise judicial functions, or still to appreciate the legitimacy of courts and tribunals³².

The national court responsible for applying EU law within its jurisdiction has an obligation to ensure that the provisions of that law are fully effective, if necessary by disapplying, on its own initiative, any national legislation or practice, even later, which is contrary to a provision of Union law having direct effect, without having to request or wait for the prior removal of such national legislation or practice by way of legislation or by any other

³²CJEU, joined cases: C- 357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion of 21 December 2021, op. cit., par. 252. C-573/17, Popławski of 24 June 2019, op. cit., par. 53. C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 53.

constitutional procedure³³.

Extraordinary control, public questions of the Supreme Court and disputes affecting the independence of a court

In the second complaint of the European Commission against Poland the judges obtained, moreover, the line of conclusions of the Advocate General A.M. Collins³⁴ regarding the extraordinary control of public affairs of the Polish supreme court, as well as the lack of independence of a court or judge in Poland who violated the obligations according to Article 19, par. 1, second paragraph TEU and Article 47 CFREU.

The organization of national jurisdictions enters into Article 4, par. 2 TEU and within the scope of the related powers that are reserved to the Member States and carried out in compliance with the values, the rights of the EU, the rule of law, independence, impartiality and the pre-constitution by law of the

33CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 200, 201, 207, 238.

34In particular the paragraphs of the conclusions: 106-110.

judges. For the CJEU:

“(...) compliance with the aforementioned provisions must be ensured transversally in all areas of application of EU law and before all courts called upon to interpret and apply EU law”.

The CJEU has also accepted the possibility that certain substantive issues falling under EU law could be attributed, in specific circumstances, to a single instance or to decentralized instances, for reasons relating to the achievement of a uniform practice on the national territory and to legal certainty³⁵ or to favor a more homogenous and specialized administration of justice and more effective judicial protection³⁶, provided that the procedural arrangements for appeals concerning rights deriving from EU law are not practically impossible or excessively difficult. The generalized control of the requirements relating to the independence of each judicial body and of each judge, ordinary and/or administrative, thus concentrating in said body

35CJEU, C-93/12, *Agrokonsulting-04* of 27 June 2013, ECLI:EU:C:2013:432, published in the electronic Reports of the cases, par. 56.

36CJEU, C-567/13, *Baczó and Vizsnyiczai* of 12 February 2015, ECLI:EU:C:2015:88, published in the electronic Reports of the cases, parr. 46, 58, 264-265.

respect for the fundamental right to effective judicial protection (paragraphs 278, 280 and 286) is singularly aggravated by the fact of considering as a disciplinary offense for a judge to guarantee said protection, by forcefully disapplying the principle of primacy, national provisions that conflict with the requirements deriving from EU law and to prevent the Polish judges from questioning the Court of Justice in prejudicial or, in any case, from discouraging from doing so, also integrating a violation of Article 267 TFEU³⁷ (Blanke, Mangiamelli, 2021).

Violation of respect for privacy, protection of personal data and CFREU

Turning to the fifth complaint of the European Commission relating to the violation of respect for private life, the right to the protection of personal data, the principles of the CFREU and of personal data, i.e. provisions, which impose on judges the obligation to make the relevant declaration and the obligation to

³⁷CJEU, C-567/13, Baczó and Vizsnyiczai of 12 February 2015, op. cit., parr. 285-290.

communicate to superiors the relevant information that is sufficient for activities carried out in the context of associations, non-profit foundations that are part of a political party and online publications that are part of the Biuletyn Informacji Publicznej³⁸. The CJEU has recognized (with regard to the Regulation of personal data and on information that falls within and that excludes national security considering as unjustified the arguments that come from Poland and subject the judges to said communications that are aimed at reducing the risk that they may be influenced, in the exercise of their functions, by considerations relating to private or political interests as well as in strengthening the confidence of individuals as to the impartiality and independence of judges) that justifications of this kind can be considered pertinent both to purposes of general

³⁸With regard to membership of a political party, art. 88a, par. 3 of the law relating to the ordinary courts after the relative amendment of 2019 provided that the judges had to submit a written declaration indicating their registration of their appointment to the judge of the registration, the denomination of the party, the positions held and the duration of the registration.

interest, recognized by Union law pursuant to Article 52, par. 1, CFREU, and to legitimate objectives of public interest, provided for by Article 6, par. 1, first paragraph and by art. 9, par. 1 and, consequently, authorize limitations on the exercise of the rights guaranteed by Articles 7 and 8 CFREU.

These limitations on the right to respect private life and the right to protect personal data are legitimate only on condition, on the one hand, that they effectively meet the aforementioned purposes, and, on the other hand, that they are proportionate to this purpose. The provisions aimed in particular at publishing information relating to a judge's membership of a political party before his appointment and during the exercise of his mandate were adopted with a view, in particular, to harming the professional reputation of judges and the perception that individuals have their independence and impartiality. Such publication can help to highlight the existence of any conflicts of interest capable of affecting the impartial exercise by the judges of their functions and that the resulting transparency is capable of

reinforcing the trust of individuals in justice.

The publication of certain information, especially relating to periods prior to those for which the judge is required to make such declarations, is not limited to what is strictly necessary. Furthermore, this information is likely to make public sensitive data on the religious or philosophical beliefs of judges exposing them to the risk of stigmatization and could also unduly hinder their careers³⁹.

Processing of personal data as well as the Polish provisions constituting an interference having to do with the fundamental rights of judges according to par. 378 of the sentence do not justify the benefits that have to do with the prevention of conflicts of interest and the increase of trust, impartiality of judges, rights that violate Article 6, par. 1, lit. c), e) and par. 3, and Article 9, par. 1 GDPR, as well as Articles 7 and 8, par. 1 CFREU.

³⁹CJEU, C-430/21, RS (Effet des arrêts d'une cour constitutionnelle) of 22 February 2022, op. cit., par. 347, 366, 371, 381.

Concluding remarks

For the history of the jurisprudence of the CJEU the last few years the rule of law is a very important challenge and is based above all on the independence, impartiality of the judges by interpreting and applying the law of the Union and also dialoguing with national judges through the appeal of the reference for a preliminary ruling⁴⁰. Within this context, the CJEU has observed the changes introduced in Poland, i.e. legislative changes in the judiciary sector that do not protect the principles and rights of the EU law, and has seen the European Commission as protagonist for the related appeals for non-compliance, precautionary and pecuniary measures but also as

40C-64/16, Associação Sindical dos Juízes Portugueses, of 27 February 2018, ECLI:EU:C:2018:117, published in the electronic Reports of the cases, parr. 1, 18, 27 and 29. Order of the President of the Court in case: C-619/18 Commission v. Poland of 15 November 2018, ECLI:EU:C:2018:910, published in the electronic Reports of the cases, par. 21 is affirmed that: “(...) the requirement for the independence of judges pertains to the essential content of the fundamental right to a fair trial, which is cardinal as a guarantee of the protection of all the rights deriving to the individual from the law of the Union and the safeguarding of the values common to the Member States set out in Article 2 TEU, in particular, of the value of the rule of law (...)”.

guardian of the rule of law of the EU.

We can say that the present judgment of 2023 is not so innovative since it was based on the conclusions of the Advocate General, as well as on the previous jurisprudence of the CJEU in combination with Article 2 TEU, on the values that form part of the very identity of the Union as a common legal order. Values that are embodied in principles entailing binding legal obligations for the Member States, i.e. the judgment of 16 February 2022 and the appeals brought by Hungary and Poland for the annulment of Regulation 2020/2092, concerning a general regime of conditionality for the protection of the Union budget⁴¹. As innovative points we can mention some single, specific aspects regarding the litigation, the modalities of allocation within the judicial system, the union of the independence of the judges, the control over the public affairs of the supreme court, the online publication of data, declarations of belonging to political parties, associations and foundations. The assessment of

⁴¹C-64/16, Associação Sindical dos Juízes Portugueses, of 27 February 2018, op. cit., par. 67.

incompatibility guarantees the protection of personal data, respect for private life, the written declaration and the possible membership of an association, non-profit foundation, political party and the publication of such information.

The inadmissibility of Article 267 TFEU is actually a success for the European Commission as it constitutes the main basis for the jurisprudence of the CJEU dealing with Polish legislation, the judiciary and the law of the Union. The counter-limits proposed by the CJEU itself and as a consequence by the right of the EU law make us think of various things that certainly have to do with the Polish exponents who are contrary to the “spirit”, and the principles of the EU and above all now that we find in the stadium of the upcoming autumn elections. The Polish economic pressure especially after the precautionary measures of the vice president of the CJEU ceased with the relative delivery of the sentence, until 5 June 2023, and the relative lack of perception of the instrument of Next Generation EU (Schwartz, 2023). Poland is already withholding 35.4 billion euros from European funds

which are agreed after the pandemic (Pech, 202a; Pech, 2002b; Scheppele, Morijn, 2023). According to Article 102 of the Financial Regulation of the Union, the relative recovery from the Union has been envisaged through the compensation that Poland will in no way be able to escape from any corresponding pecuniary sanction that is due, reaching the figure of 550 million euros⁴². No benefits for the Polish authorities and above all the political support that was shown towards Ukraine after the Russian invasion by focusing on the reception of one and a half million refugees (Pech, 2022b).

The European Commission in its annual Rule of Law Report, published on 5 July 2023, reaffirmed “serious concerns” about the independence of the Polish judicial system, underlining that there has been “progress” on six recommendations, contained in

⁴²Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, PE/13/2018/REV/1, OJ L 193, 30.7.2018, p. 1-222.

last year's report. They concern precisely judicial independence, in addition to freedom of the media and the introduction of stricter rules on lobbying and anti-corruption. The European Commission renewed the invitation to separate the functions of the Minister of Justice and the Attorney General, who, as is well known, supervises the conduct of all criminal proceedings and also provides legal advice to the government⁴³.

Within this context the European Parliament continues the same line of political pressure against Poland by adopting a resolution on the electoral law, the investigative commission and the rule of law in it⁴⁴. The concern of the European Parliament is based on the amendments of the law on the supreme court and the laws adopted, giving the supreme administrative court its new

43EUROPEAN COMMISSION, 2023 Rule of Law Report, Country Chapter on the rule of law situation in Poland, Commission Staff Working Document, Brussels, 5 July 2023, SWD (2023) 821 final.

442023/2747(RSP): Resolution on the electoral law, the investigative committee and the rule of law in Poland of 14 June 2023. European Parliament resolution of 11 July 2023 on the electoral law, the investigative committee and the rule of law in Poland (2023/2747(RSP)): https://www.europarl.europa.eu/doceo/document/TA-9-2023-0268_EN.html

mandate for disciplinary cases involving judges without distinguishing appointed judges who are legally appointed by the illegitimate national council of the judiciary. The Assembly called on the Polish authorities to withdraw the lex tusk and suspend the effects of the Venice Commission of the Council of Europe by issuing its opinion and the legislation it amended accordingly. The European Parliament, on the one hand, has reflected on the act sent to the European Commission to proceed with the infringement procedure, and on the other, has checked and asked the CJEU to use its power to order interim measures against the relevant case, i.e. Poland.

References

Birkinshaw, P.J. (2020). *European public law: The achievement and the Brexit challenge*. Kluwer Law International, New York.

Blanke, H.J., Mangiamelli, S. (2021). *Treaty on the Functioning of the European Union. A commentary*. ed. Springer, Berlin.

Di Federico G. (2019). The potential of Article 4 (2) TEU in the solution of constitutional clashes based on alleged violations of national identity and the quest for adequated (judicial) standards. *European Public Law*, 25 (3), 347-380.

Duncan, A., Macy, J. (2020). The collapse of judicial independence in Poland: A cautionary tale. *Judicature*, 41-50.

Ellingsen, H.K. (2021). *Standing to enforce European Union law before national courts*. Hart Publishing, Oxford & Oregon, Portland.

Elòsegui, M., Miron, A., Motoc, I. (eds) (2021). *The rule of law in Europe: Recent challenges and judicial responses*. ed. Springer, Cham.

Gajda-Roszynalska, K., Markiewicz, K. (2020). Disciplinary

proceedings as an instrument for breaking the rule of law in Poland. *Hague Journal on the Rule of Law*, 12.

Gersdorf, M., Pilich, M. (2020). Judges and representatives of the people: A polish perspective. *European Constitutional Law Review*, 16 (3), 345-378.

Ibàñez Garcia, A. (2020). *La facultad discrecional de la Comisión Europea en los procedimientos de infracción en tiempo y forma del derecho europeo: aspectos criticos*. Sepín, Madrid.

Kierst, N. (2023, June, 7). Better late than never: The 2019 Polish judicial reform creating a disciplinary Chamber and enacting a muzzle law violated EU Law. *Brexit Institute News*: <https://dcubrexitinstitute.eu/2023/06/the-2019-polish-reform-judicial-reform-creating-a-disiplinary-chamber-and-enacting-a-muzzle-law/>

Kochenov, D.V. (2023). Dialogical rule of law in the hands of the Court of Justice: Analysis and critique. Central European University, *Democracy Institute Working Paper*, 2023/11.

Krajewski, M. Ziòłkowski, M. (2020). EU judicial independence

decentralized: A.K.. *Common Market Law Review*, 57 (4), 1107-1138.

Leloup, M., Kochenov, D.V., Dimitrovs, M. (2021, June). Non-regression: Opening the door to solving the “Copenhagen dilemma”? All the eyes on case C-896/19 *Repubblika v Il-Prim Ministru*. *Reconnect. Working Paper*, No.15: https://reconnect-europe.eu/wp-content/uploads/2021/06/WOP15_June2021.pdf

Liakopoulos, D. (2019a). *European integration through member states' constitutional identity in EU law*. ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2019b). Regulation (EU) 2016/679 on the protection of personal data in light of the “Cambridge Analytica” affair. *E-Journal of Law. An independent law Journal*, 5 (1).

Liakopoulos, D. (2022). The rule of law conditionality. Opportunity and challenges. *Revista Estudios Europeos*, 81, 1-28.

Miasik, D., Szwarc, M. (2021). Primacy and direct effect-still together. *Common Market Law Review*, 58 (2), 574ss.

Moraru, M., Bercea, R. (2022). The first episode in the Romanian rule of law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația ‘Forumul Judecătorilor din România, and their follow-up at the national level. *European Constitutional Law Review*, 18(1), 88ss.

Pech, K. (2023a, June, 11). Doing justice to Poland’s muzzle law. The latest ECJ judgement on Poland’s rule of law breakdown. *Verfassungsblog*: <https://verfassungsblog.de/doing-justice-to-polands-muzzle-law/>

Pech, L. (2022a, June, 22). Covering up and rewarding the destruction of the rule of law one milestone at a time. *Verfassungsblog*: <https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/>

Pech, L. (2022b). The rule of law as a well-established and well-defined principle of EU law. *Hague Journal Rule of Law* 14, 111ss.

Pech, L. (2023b, April). The European Court of Justice’s

jurisdiction over national judiciary-related measures, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 747.368, April 2023.

Pech, L., Wachowiec, P. (2021, March, 28). A letter to the European Commission. *Verfassungsblog*:

<https://verfassungsblog.de/a-letter-to-the-european-commission/>

Pohjankoski, P. (2021). Rule of law with leverage: Policing structural obligations in EU law with the infringement procedures, fines, and set-off. *Common Market Law Review*, 58 (5), 1341-1364.

Prete, K. (2017). *Infringement proceedings in EU law*. Wolters Kluwer, Alphen aan den Rijn.

Prete, K. (2020, April, 15). Infringement procedures in the time of Covid-19. *Verfassungsblog*:

<https://verfassungsblog.de/infringement-procedures-in-the-time-of-covid-19/>

Richard, A. (2021). *Procédure en manquement d'État et*

protection des droits fondamentaux dans l'Union européenne. ed. Bruylant, Bruxelles.

Rosas, A., Raitio, J., Pohjankoski, P. (2023). *The rule of law's anatomy in the European Union. Foundations and protections.* Hart publishing, Oxford & Oregon, Portland.

Sadurski, W. (2023, May 31). The law to take out tusk. *Verfassungsblog*: <https://verfassungsblog.de/the-law-to-take-out-tusk/>

Scheppele, K.L., Morijn, N. (2023, April, 4). Frozen: How the EU is blocking funds to Hungary and Poland using a multitude of conditionalities. *Verfassungsblog*: <https://verfassungsblog.de/frozen/>

Schmidt, M., Bogdanowicz, M. (2018). The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU. *Common Market Law Review*, 55 (4), 1061-1100.

Scholtes, J. (2023). Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU.

European Constitutional Law Review, 19 (1), 59-87.

Schwarcz, A. (2023). Rule of law-related “super milestones” in the recovery and resilience plans of Hungary and Poland, Briefing Requested by the CONT committee, Policy Department for Budgetary Affairs, Directorate-General for Internal Policies, PE 741.581, January 2023.

Spieker, L. (2019). Breathing life into the Union’s common values: On the judicial application of article 2 TEU in the EU value crisis. *German Law Journal*, 20(8), 1182-1213.

Torrecillas Martinez, A. (2023). *La crisis del Estado de Derecho en la Unión Europea: el caso polaco*. Tirant Lo Blanc, Valencia.

Vàrnay, E. (2020). La renaissance des procédures en manquement. *Annuaire de Droit de l’Union Européenne* 2019, 155-190.

Vissers, N. (2023, June, 13). Enforcing democracy how the European Commission is testing out the legal waters. *Verfassungsblog*:

<https://verfassungsblog.de/enforcing-democracy/>

Zoll, Z., Południak-Gierz, K., Bańczyk, W. (2022, June). Primacy of EU law and jurisprudence of Polish Constitutional Tribunal. Recent developments in the light of the Polish Constitutional Tribunal's, case law, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 732.475, June 2022.